

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Calaveras)

BANK OF AMERICA, N.A.,

Plaintiff, Cross-defendant and
Respondent,

v.

DON H. LEE,

Defendant, Cross-complainant and
Appellant.

C084613

(Super. Ct. Nos. 14CV40435,
17CV42098)

ORDER MODIFYING
OPINION AND DENYING
REHEARING

[NO CHANGE IN
JUDGMENT]

THE COURT:

It is ordered that the opinion filed in this case on June 25, 2019, be modified as follows:

On page 2, second full paragraph, remove the second sentence which reads “We will modify the order in case No. 14CV40435 to include, among other things, an appealable judgment, and affirm the judgment in that case.” Replace with the following:

“We will modify the judgment in case No. 14CV40435 to add a provision that the settlement is fully enforceable pursuant to section 664.6, and affirm the judgment in that case.”

On page 4, remove the third full paragraph beginning with “Lee” and replace with the following:

“We deem Lee’s appeal in case No. 14CV40435 to be from the March 15, 2017 judgment. Lee also appealed from the judgment of dismissal in case No. 17CV42098.”

On page 11, Disposition, remove the first sentence which reads “The trial court’s order entered on March 3, 2017 in case No. 14CV40435 is modified to add a provision that the settlement is fully enforceable pursuant to Code of Civil Procedure section 664.6, and the order is further modified to include an appealable judgment consistent with the order as modified.” Replace with the following:

“The judgment in case No. 14CV40435 is modified to add a provision that the settlement is fully enforceable pursuant to Code of Civil Procedure section 664.6.”

This modification does not change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

/S/
BUTZ, Acting P. J.

/S/
MAURO, J.

/S/
RENNER, J.

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(Super. Ct. Nos. 14CV40435,
17CV42098)

Bank of America, N.A. initiated case No. 14CV40435 to resolve disputes concerning a deed of trust secured by real property in Calaveras County. The parties ultimately reached settlement at a mandatory settlement conference, but when defendant and cross-complainant Don Lee refused to sign a formal settlement agreement document prepared by Bank of America, the bank moved to enforce the settlement pursuant to Code of Civil Procedure section 664.6.¹ Lee did not make his own motion to enforce the settlement, but instead filed a separate lawsuit against Bank of America for breach of contract (case No. 17CV42098). The trial court granted Bank of America's motion to

¹ Undesignated statutory references are to the Code of Civil Procedure.

enforce the settlement, and on its own motion also dismissed as moot Lee's complaint in the separate lawsuit.

Lee now contends (1) Bank of America was not entitled to use section 664.6 to enforce the settlement, and (2) the trial court lacked authority to dismiss the separate action.

We conclude it was appropriate for Bank of America to enforce the settlement pursuant to section 664.6, but the trial court should not have dismissed the separate lawsuit without giving the parties notice and an opportunity to be heard. We will modify the order in case No. 14CV40435 to include, among other things, an appealable judgment, and affirm the judgment in that case. But we will reverse the judgment in case No. 17CV42098 and remand that matter for further proceedings.

In addition, we grant Bank of America's unopposed request for judicial notice. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) And we also grant Lee's unopposed request for calendar preference.

BACKGROUND

Bank of America initiated case No. 14CV40435 against Mark Weiner, trustee of the Elias Greenberg III Trust Agreement dated December 21, 1987 (Weiner), along with others, to resolve disputes concerning a deed of trust secured by real property in Calaveras County. The first amended complaint alleged that the prior owners of the property executed a deed of trust (the Weiner deed of trust) in favor of Weiner to secure a loan from Weiner, and subsequently executed a second deed of trust to secure a loan from Eagle Home Mortgage, Inc. The second deed of trust was assigned to Bank of America. According to Bank of America, Weiner refused to reconvey the Weiner deed of trust after the Weiner loan was paid off.

Weiner filed a cross-complaint to foreclose on his deed of trust, alleging that his loan to the prior owners was not paid off and that his deed of trust was in full force and

effect. Weiner subsequently assigned his interest in the Weiner deed of trust and the cross-complaint to Don Lee.

The parties reached a settlement at a mandatory settlement conference. The trial court described the settlement terms as follows: “1) The Defendants and Cross-complainants will execute a Deed of Reconveyance in recordable form; [¶] 2) Upon recordation of the Deed of Reconveyance, the complaint and cross-complaint will be dismissed with prejudice; [¶] 3) All parties will waive their fees and costs; [¶] 4) Counsel for Bank of America will prepare a formal settlement agreement to include Civil Code Section 1542 waivers; [¶] 5) The Defendants and Cross-complainants represent and warrant they have the authority to execute the Deed of Reconveyance; [¶] 6) Upon confirmation that the Deed of Reconveyance has recorded, counsel for Bank of America shall cause to be delivered a check in the sum of \$5,000 payable to DON LEE; [¶] 7) Payment of the above amount is made by Stewart Title Guaranty Company; [¶] 8) The settlement is subject to a confidentiality clause that will be inserted into the formal settlement agreement[.] [¶] Upon the Court signing below, this settlement agreement is fully enforceable pursuant to Code of Civil Procedure Section 664.6.” The parties signed the document prepared by the trial court, and the document was also signed by the trial court.

Counsel for Bank of America prepared a formal settlement agreement document, but Lee refused to sign it, asserting it added new terms. Instead, Lee sought to perform on certain settlement terms. He filed a request to dismiss the cross-complaint with prejudice, and dismissal of the cross-complaint was entered. Lee also signed and recorded a deed of reconveyance. Lee asked Bank of America to pay the \$5,000 referenced in the settlement, but according to Lee, Bank of America would not pay until the formal settlement agreement document was signed. Lee filed a separate lawsuit against Bank of America for breach of contract. (Case No. 17CV42098).

The following month, Bank of America moved to enforce the settlement pursuant to section 664.6. The motion sought a judgment ordering Lee to sign the formal settlement agreement document. Lee opposed the motion and did not file a motion to enforce any portion of the settlement.

The trial court found that the formal settlement agreement document prepared by Bank of America was consistent with the settlement. Accordingly, it granted Bank of America's section 664.6 motion, ordered Lee to sign the formal settlement agreement document, and also ordered Lee to sign a dismissal form for case No. 14CV40435. In addition, on its own motion, the trial court took judicial notice of the pleadings in case No. 17CV42098, found that the allegations in that case had been rendered moot by the trial court's ruling on Bank of America's section 664.6 motion, and dismissed the complaint in case No. 17CV42098 with prejudice.

Lee appeals from the March 3, 2017 order in case No. 14CV40435, and he also appeals from the judgment of dismissal in case No. 17CV42098. Although section 664.6 provides for entry of "judgment pursuant to the terms of the settlement," the record does not show that a formal judgment was entered in case No. 14CV40435. Nevertheless, because the effect of the trial court's order was to finally determine the rights of the parties, we will amend the order to include an appealable judgment. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183 (*Hines*).)

STANDARD OF REVIEW

We will not disturb the trial court's factual findings if they are supported by substantial evidence. (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) As part of our review, we will draw all reasonable inferences to support the trial court's findings. (*Ibid.*) However, we review de novo the trial court's order enforcing the settlement agreement, along with its application of the law to undisputed facts. (*Weinstein v. Rocha* (2012) 208 Cal.App.4th 92, 96 (*Weinstein*); *Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1428 (*Elyaoudayan*).)

California Rules of Court, rule 8.204(a)(1)(B) requires that an appellate brief must state each point under a separate heading or subheading summarizing the point. We decline to consider contentions not summarized in a heading or subheading. We also do not address contentions raised for the first time in appellant's reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

DISCUSSION

I

Lee contends Bank of America was not entitled to use section 664.6 to enforce the settlement. He is wrong. The document that Lee and the other parties signed at the settlement conference, and that the trial court also signed, expressly stated that the settlement agreement was enforceable pursuant to section 664.6.

Lee also argues the trial court lacked jurisdiction to consider the section 664.6 motion, certain portions of the formal settlement agreement document were inconsistent with the settlement, and the formal settlement agreement document did not include all the material settlement terms. We address each argument in turn.

A

Lee asserts the trial court lacked jurisdiction to consider the section 664.6 motion. He claims the trial court lost jurisdiction over him when Lee dismissed the cross-complaint, and there was no request for the trial court to retain jurisdiction consistent with *Wackeen v. Malis* (2002) 97 Cal.App.4th 429 (*Wackeen*). According to Lee, the trial court's order granting the section 664.6 motion is void. We disagree.

In general, a complaint and cross-complaint are treated as independent actions. (*K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 503.) Lee dismissed the cross-complaint, but the record does not show that the complaint or the entire action had been dismissed. While it is true that a trial court lacks subject matter jurisdiction to consider a section 664.6 motion when the entire action has been dismissed and the parties did not make a clear written request that jurisdiction be retained (*Wackeen, supra*,

97 Cal.App.4th at pp. 433, 440-441), that is not the situation here. A judgment is presumed to be correct (*Hines, supra*, 167 Cal.App.4th at p. 1183), and Lee bears the burden of demonstrating error on the basis of the record on appeal (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609). Lee’s argument fails because the record on appeal does not show that the trial court lost subject matter jurisdiction over the entire action.

B

Lee next contends portions of the formal settlement agreement document were inconsistent with the settlement.

Section 664.6’s express authorization for trial courts to determine whether a settlement has occurred is also an implicit authorization for the trial court to interpret the terms and conditions of settlement. (*Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 566.) The trial court may determine the settlement terms, but it may not modify those terms. (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1460; *Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1176; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 797, 810 (*Weddington*).)

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts.” (*Weddington, supra*, 60 Cal.App.4th at p. 810.) In interpreting a written instrument, we “ ‘give effect to the mutual intention of the parties as it existed’ at the time the contract was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract’s terms. [Citations.]” (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126; see also *Weinstein, supra*, 208 Cal.App.4th at p. 97.)

Lee asserts that “release of claims” language in the formal settlement agreement document will prevent him from enforcing Bank of America’s obligation to pay him \$5,000. But the settlement provided that Bank of America would prepare a formal settlement agreement document that would “include Civil Code Section 1542 waivers.”

Civil Code section 1542 provides: “A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.” The parties’ agreement to include Civil Code section 1542 waivers indicates that they contemplated releases of claims which would encompass unknown claims. The formal settlement agreement document contained a general release and a Civil Code section 1542 waiver. The trial court did not err in finding those provisions are consistent with the settlement.

Lee also challenges a “covenant not to sue” provision in the formal settlement agreement document. A covenant not to sue is an agreement not to enforce an existing cause of action. (*Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 711-712, overruled on other grounds by *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 302, fn. 1.) Unlike a release, it does not extinguish the cause of action. (*Ibid.*) The covenant not to sue provision in the formal settlement agreement document is consistent with the parties’ agreement to include a release of claims; “the distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based mainly, if not entirely, on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit.” (*Id.* at p. 711.) Where there is no joint tortfeasor or obligor, a covenant not to sue “may be pleaded as a bar to the action in order to avoid circuity of action” (*Id.* at pp. 711-712; see *Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 551-552.) Here, Bank of America is the sole cross-defendant. Lee does not express a concern that a release as to Bank of America would release other alleged wrongdoers. Thus, the trial court did not err in finding the covenant not to sue provision consistent with the settlement.

Lee further objects to a “warranty of no assignment / no liens” provision in the formal settlement agreement document. He says he cannot agree there was never any assignment because Weiner made an assignment to Lee. But the challenged provision actually states: “The Parties warrant and represent that they have not previously assigned or transferred, or purported to assign or transfer to any person or entity any of the claims released herein; and further warrant and represent that they have no knowledge of any lien filed against the actions by any party or entity.” As to Lee, that statement would not be untrue unless Lee previously assigned or transferred or purported to assign or transfer any interest he received from Weiner. Lee does not so contend. The disputed provision does not require Lee to represent that Weiner never made an assignment to Lee.

Lee adds an objection that the confidentiality provision in the formal settlement agreement document is moot because Bank of America discussed the terms of the settlement in its section 664.6 motion. But because the argument was not raised in the trial court, we will not consider it on appeal. (*Damiani v. Albert* (1957) 48 Cal.2d 15, 18; *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 371, fn. 8.) Lee conceded in the trial court that the confidentiality provision in the formal settlement agreement document was proper.

Lee asks us to add language to the judgment requiring Bank of America to perform various acts. Section 664.6 authorizes entry of judgment “upon motion,” and here the record does not show any motion by Lee, made upon proper notice, in the trial court.

Lee claims Bank of America was required to first sign the formal settlement agreement document before the trial court could enforce it. We do not consider this claim because Lee fails to support it with legal analysis. (*Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656.) Although he says *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299 is arguably applicable, Lee fails to explain how that case, in which there was no writing

signed by the parties, applies here. The parties cannot escape their obligations under the settlement by refusing to sign a formal written agreement which conforms to the terms of the settlement. (*Elyaoudayan, supra*, 104 Cal.App.4th at p. 1431; *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530 [“When parties . . . agree on all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the . . . agreement.”]; *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48-49.)

Lee’s arguments that the formal settlement agreement document was inconsistent with the settlement lack merit.

C

In addition, Lee asserts the formal settlement agreement document does not include all the material settlement terms. We agree.

A judgment entered pursuant to section 664.6 should reflect all the material terms of settlement so as not to “defeat the purposes of the settlement and spawn further litigation.” (*Hines, supra*, 167 Cal.App.4th at p. 1185.) The settlement provides that the parties’ agreement “is fully enforceable pursuant to Code of Civil Procedure Section 664.6.” That term was not included in the formal settlement agreement document and section 664.6 order. The judgment must include this term.

II

Lee further contends the trial court lacked authority to dismiss case No. 17CV42098.

The constitutional guarantee of due process requires that a trial court give notice and an opportunity to respond before dismissing an action on its own motion. (*In re Marriage of Straczynski* (2010) 189 Cal.App.4th 531, 538-539; *Bricker v. Superior Court* (2005) 133 Cal.App.4th 634, 639 (*Bricker*); *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 510; *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1193-1194 (*Reid*);

Moore v. California Minerals Products Corp. (1953) 115 Cal.App.2d 834, 835-837.) Here, although Bank of America did not move for dismissal of case No. 17CV42098, the trial court nevertheless dismissed that action on its own motion and with prejudice. There is no indication Lee had prior notice that the trial court was considering dismissing case No. 17CV42098.

Under the circumstances, and regardless of whether dismissal is ultimately appropriate on the merits, the trial court should not have dismissed case No. 17CV42098 without affording the parties proper notice and an opportunity to be heard. (*In re Marriage of Straczynski, supra*, 189 Cal.App.4th at pp. 538-539; *Bricker, supra*, 133 Cal.App.4th at p. 639; *Reid, supra*, 14 Cal.App.4th at 1194.) The dismissal order must be set aside. (*Bricker, supra*, 133 Cal.App.4th at p. 639; *Reid, supra*, 14 Cal.App.4th at pp. 1193-1194.)

Citing *Morris B. Silver M.D., Inc. v. International Longshore & Warehouse etc.* (2016) 2 Cal.App.5th 793, Bank of America urges that any error by the trial court is harmless. But *Silver* is inapposite because the trial court in that case dismissed the complaint based on Employee Retirement Income Security Act (ERISA) preemption, an issue those parties had addressed in their demurrer briefing. (*Id.* at pp. 797-798.) Instead of ruling on the demurrer, the trial court in *Silver* dismissed the action and found the demurrer moot. (*Id.* at p. 797.) Here, however, the complaint in case No. 17CV42098 asserted causes of action that were not before the trial court in the section 664.6 motion.

Bank of America adds that Lee cannot demonstrate prejudice because the trial court heard Lee's motion to vacate the judgment after it dismissed case No. 17CV42098. But *Cordova v. Vons Grocery Co.* (1987) 196 Cal.App.3d 1526, the case Bank of America cites in support of this proposition, does not persuade us that the trial court's error was harmless. In *Cordova*, although the trial court dismissed the lawsuit on its own motion and without notice, it heard the plaintiff's motion for reconsideration *before* the judgment was entered. (*Id.* at p. 1531.) The Court of Appeal held that because the

plaintiff was afforded a hearing on the propriety of the dismissal before judgment was entered, there was no due process violation. (*Id.* at pp. 1531-1532.) In this case, however, Lee did not receive a hearing on this issue until after judgment was entered.

DISPOSITION

The trial court's order entered on March 3, 2017 in case No. 14CV40435 is modified to add a provision that the settlement is fully enforceable pursuant to Code of Civil Procedure section 664.6, and the order is further modified to include an appealable judgment consistent with the order as modified. The judgment in case No. 14CV40435 is affirmed as modified.

The judgment in case No. 17CV42098 is reversed and the matter is remanded for further proceedings consistent with this opinion.

The parties shall bear their own costs on appeal.

/S/
MAURO, J.

We concur:

/S/
BUTZ, Acting P. J.

/S/
RENNER, J.